

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CONNIE COLLINS**

Claimant

VS.

**THE BOEING COMPANY - WICHITA**

Respondent

AND

**AETNA CASUALTY & SURETY COMPANY**

Insurance Carrier

AND

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 175,107

**ORDER**

The respondent and its insurance carrier appeal from an Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on October 6, 1994.

**APPEARANCES**

The respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Steven Foulston of Wichita, Kansas, who appeared for James R. Roth. There were no other appearances.

**RECORD**

The record considered by the Appeals Board is enumerated in the Award of the Special Administrative Law Judge.

**ISSUES**

The sole issue now before the Appeals Board is the liability of the Workers Compensation Fund. The Special Administrative Law Judge did not assess liability against the Fund which prompted the respondent and insurance carrier to request this review. The respondent and insurance carrier contend they are entitled to contribution from the Workers Compensation Fund pursuant to K.S.A. 1992 Supp. 44-567(a)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the finding and Award of the Special Administrative Law Judge should be affirmed.

The facts are not in dispute. The claimant developed overuse injuries in both upper extremities while working for the respondent through October 1992. After conservative treatment did not cure her, claimant underwent carpal tunnel release surgeries in May and June of 1993. After recuperating from surgery, claimant's treating physician sent her to work hardening where she sustained additional permanent injury and impairment to both upper extremities. Because of work hardening, claimant's permanent impairment to the whole body increased either from twelve percent (12%) to twenty percent (20%), or from six percent (6%) to ten percent (10%) as indicated by physicians Ernest R. Schlachter, M.D. and Kenneth D. Zimmerman, M.D., respectively.

Before the parties submitted their case to the Special Administrative Law Judge, claimant entered into a lump sum settlement with the respondent. Because of the increased injury and impairment claimant sustained during work hardening, the respondent and insurance carrier now contend the Workers Compensation Fund should be responsible for a portion of the settlement; however, the Appeals Board disagrees.

The purpose of the Kansas Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. *Morgan v. Inter-Collegiate Press*, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); *Blevins v. BuilDEX, Inc.*, 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

"'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

. . . .

"15. Loss of or partial loss of the use of any member of the body;

"16. Any physical deformity or abnormality;

"17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1992 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting

disability or death was contributed to by the preexisting impairment. See K.S.A. 1992 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1992 Supp. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to his former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), Aff'd 242 Kan 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Kansas Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra*.

Although provisions imposing liability upon the Workers Compensation Fund are to be liberally construed, the Workers Compensation Act should be interpreted in such manner to carry out its primary and basic purposes. As indicated above, the Legislature created the Workers Compensation Fund for the basic and primary purpose of encouraging the employment of impaired individuals. Assessing liability against the Fund in situations where that primary purpose is not furthered is improper.

The respondent has a statutory duty to provide medical care to an injured worker. Therefore, the existence of the Workers Compensation Fund is not an incentive or factor in retaining claimant during medical treatment. In the case now before us, the injury sustained during work hardening would have occurred regardless of whether respondent retained claimant in its employment. Because there is no relationship or connection between the injury sustained during work hardening and the hiring or retention of claimant in respondent's employ, the Appeals Board finds the respondent, and not the Workers Compensation Fund, should be responsible under this factual situation for the subsequent injury. To hold otherwise would be to convolute the intent and purpose of the Workers Compensation Act.

We now hold that respondent and insurer, and not the Workers Compensation Fund, is responsible for injuries sustained by an injured worker during medical treatment for an earlier work-related injury.

The Appeals Board adopts the findings and conclusions of the Special Administrative Law Judge that are not inconsistent with those specifically set forth in the Award herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on October 2, 1994, should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1995.

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BOARD MEMBER

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: James R. Roth, Wichita, KS  
Eric K. Kuhn, Wichita, KS  
Steven Fouslton, Wichita, KS  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director